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SUPREME COURT OF PENNSYLVANIA

JANUARY TERM, 1946

No. 181

CHELTENHAM AND ABINGTON SEWERAGE COMPANY,

Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

STATEMENT AS TO JURISDICTION OF SUPREME COURT OF THE UNITED STATES

(a) Statutory Provision Believed to Sustain Jurisdiction

Jurisdiction is invoked under Section 237(a) of the Judicial Code (28 U. S. C. A. Sec. 344a) and Section 2 of Rule 46 of the Revised Rules of the Supreme Court of the United States, in that there is drawn in question the validity of certain statutes of the Commonwealth of Pennsylvania, on the ground that said statutes, as construed by the Supreme Court of Pennsylvania, the highest court of said State in which a decision in the suit could be had, are repugnant to the Constitution and laws of the United States.

(b) The Statutes of Pennsylvania, the Validity of Which Is Involved

The Statutes of the Commonwealth of Pennsylvania, the validity of which is involved in this proceeding, is the Act of July 26, 1913, P. L. 1374 (as amended by the Act of June 12,

1931, P. L. 530), and the Act of May 28, 1937, P. L. 1053, the pertinent provisions of which are set out verbatim as follows:

Article V, Section 3, of the Act of July 26, 1913, P. L. 1374

"Whenever the Commission shall determine, after hearing, and upon its own motion, or upon complaint, that the rates * * * collected by any public service company * * * are unjust or unreasonable * * * then the Commission shall determine, and prescribe by a specific order, the maximum just, due, equal, and reasonable rates * * * to be thereafter * * * collected for the service to be performed."

Article V, Section 5, of the Act of July 26, 1913, P. L. 1374

"If * * * the Commission shall determine that any rates which have been collected * * * by any public service company complained of, were in violation of any order of the Commission, or were unjust and unreasonable, or unjustly discriminatory, or unduly or unreasonably preferential; * * * the Commission shall, upon petition, have the power and authority to make an order for reparation, awarding and directing the payment to any such complainant petitioner, within a reasonable time specified in the order, of the amount of damages sustained in consequence of such unjust, unreasonable, or unlawful collections, * * * of such public service company: provided, that such damages have been actually sustained by such complainant petitioner.

* * * * * * *

No reparation, as herein provided, shall be awarded by the Commission unless the complaint or petition shall have been filed with it within two years from the time when the cause of action accrued * * *."

Article VI, Section 22, of the Act of July 26, 1913, P. L. 1374, as amended by the Act of June 12, 1931, P. L. 530

"At the hearing of the appeal, the said (Superior) Court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law: Provided, however, That in every appeal taken, including those already taken and undetermined, involving a question of the reasonableness of rates, whether such appeal shall have been taken by a complainant or by a public service company, it shall be the duty of the court to consider the entire record of the proceedings before the commission, including the testimony, and, on its own independent judgment, to determine whether or not the findings made and the valuations and rates fixed by the commission are reasonable and proper. If the court shall determine that the findings or the valuations are unreasonable, or that the rates fixed are unreasonably high, it shall remit the case to the commission with directions to reform the findings, valuations, and rates in accordance with the court's opinion."

Article III, Section 313 (a) of the Act of May 28, 1937, P. L. 1053

"(a) If, in any proceeding involving rates, the commission shall determine that any rates received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within two years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. * * * Any order of the commission awarding a refund shall be made for and on

behalf of all patrons subject to the same rate of the public utility."

(c) Date of Judgment Sought to Be Reviewed and Date of Presentation of Petition for Allowance of Appeal

The date of the final judgment of the Supreme Court of Pennsylvania which is sought to be reviewed is December 2, 1946.

Petition of petitioner for re-argument before said Court was refused under date of January 7, 1947.

The date upon which the petition for allowance of appeal to the Supreme Court of the United States is being presented to the Chief Justice of the Supreme Court of Pennsylvania is February 21, 1947.

(d) Nature of Case and Cases Believed to Sustain Jurisdiction

The judgment of the Supreme Court of Pennsylvania which petitioner is endeavoring to have reviewed by the Supreme Court of the United States, holds that petitioner is liable for reparations for collecting rates previously approved by the Public Service Commission of Pennsylvania in a rate proceeding, as reasonable and proper.

The said judgment of the Supreme Court of Pennsylvania also holds that the question of who is entitled to damages is a procedural one and that therefore the provisions of the Public Utility Law of 1937 apply rather than those of the Public Service Company law of 1913, contrary to the contention of petitioner that the said question is definitely substantive and that to refuse to apply the provisions of the Public Service Company Law of 1913, which provides that only such complainant petitioners as have actually sustained damages and who have filed their complaint or petition within two years of the time when the

cause of action accrued, are entitled to reparations, amounts to confiscation and contravenes Section 1, Amendment XIV of the Constitution of the United States in that it deprives the petitioner of its property without due process of law and further denies to petitioner the equal protection of the laws.

Cases relied upon to sustain jurisdiction are *Bluefield etc. Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 683, 43 S. Ct. 675, 67 L. Ed. 1176; *Northern Pacific Railway Co., et al.* v. *Department of Public Works of State of Washington, et al.*, 268 U. S. 39; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, and cases cited; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287.

(e) Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The questions involved in this appeal are substantial in that the determination thereof by the Supreme Court of Pennsylvania contravenes the Fourteenth Amendment of the Constitution of the United States and is contrary to applicable decisions of the United States Supreme Court.

In support of this contention petitioner submits that inasmuch as the rates here involved were prescribed by the Public Service Commission of Pennsylvania, acting in its quasi legislative capacity in a rate proceeding, and remained unchallenged for a period of approximately three and one-half years from their effective date, the determination by the Commission in a subsequent reparation proceeding, acting in its quasi-judicial capacity, wherein it ignores its own pronouncement promulgated in its quasi legislative capacity and retroactively repeals its own enactment as to the reasonableness of the rates it has prescribed, and the affirmation thereof by the Supreme Court of Pennsylvania, amounts to confiscation of the property of the peti-

tioner without due process of law and denies to it the equal protection of the laws and is contrary to an applicable decision of the United States Supreme Court in the case of *Arizona Grocery Co.* v. *Atchison, Topeka and Sante Fe Railway Co.*, 284 U. S. 270, and to other closely analogous decisions of the said Court in the cases of *Forbes Boat Line* v. *Commissioners*, 258 U. S. 338; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440; *Calder* v. Bull, 3 Dall. 385, 388, 391; *Murray's Lessee* v. *Land Co.*, 18 How. 272, 276, 277; *Hurtado* v. *Calif.*, 110 U. S. 516, 535, 536; *Twining* v. *New Jersey*, 211 U. S., 78, 101, 102.

Petitioner further submits that the determination of the Supreme Court of Pennsylvania to the effect that the question as to who is entitled to reparations is one of procedure rather than one of substance and that it should be determined in accordance with the provisions of the Public Utility Law of 1937 rather than under the provisions of the Public Service Company law of 1913, in spite of the fact that this proceeding had its inception on October 17, 1935, more than a year and a half prior to the effective date of the Public Utility Law of 1937, also amounts to confiscation of its property without due process of law and denies to it the equal protection of the laws for the reason that under the provisions of the Public Service Company Law of 1913 only such complainant petitioners who have actually sustained damages and who have filed their complaint or petition within two years from the time when the cause of action accrued, are entitled to reparations, whereas the Public Utility Law of 1937 provides that any order of the Commission awarding reparations shall be made for and on behalf of all patrons subject to the same rate of the public utility involved.

(f) Stage in Proceedings Before Commission and in the Appellate Courts at Which and the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised and the Method of Raising Them; and How Disposed of.

The Federal questions sought to be reviewed were first raised by way of exceptions to the order nisi of the Public Service Commission in this proceeding entered January 3, 1940, said exceptions being as follows:

> (1) "Respondent excepts generally to the entire order nisi of the Commission because said order is arbitrary, unlawful and in contravention of the Fourteenth Amendment of the Constitution of the United States and of the First and Tenth Sections of the First Article of the Constitution of Pennsylvania." (Record 200a)
>
> (4) "Respondent excepts to the order nisi of the Commission because the said order is against the law." (Record 201a)

The federal questions were again raised in the brief filed with the said Commission by appellant sur the said exceptions to the order nisi (Record p. 214a).

The Commission disposed of said exceptions in its order of September 23, 1940, as follows:

> "1, 2, 3, 4—these exceptions are general in character and allege the order nisi to be unlawful, unconstitutional and arbitrary, against the weight of the evidence, and against the law. We perceive no merit in these exceptions, and they will be dismissed." (Record p. 228a)

The federal questions were again raised in the specifications of error assigned by appellant in its petition in appeal

to the Superior Court of Pennsylvania from the order of the Commission of September 23, 1940, as follows:

> "The Commission erred in dismissing exceptions Nos. 1, 2, 3 and 4 to its order nisi" (Record p. 241a).

The federal questions were again raised in the assignment of error No. 2 filed by the appellant with the Superior Court of Pennsylvania wherein appellant complained the Commission erred in dismissing its exceptions 1, 2, 3 and 4 to the Commission's order nisi, which assignment of error was expressly overruled by the Superior Court in its opinion of October 2, 1941, (146 Pa. Superior Ct. 274, 22 A. 2d 37), without discussion, as follows:

> "The ninth, tenth, eleventh and twelfth assignments of error, in so far as they relate to dismissal of appellant's twentieth and thirtieth exceptions to the order nisi of the commission, are sustained. The remaining assignments of error are overruled."

The said federal questions were also discussed by appellant in its brief filed with the Superior Court of Pennsylvania.

The federal questions were again raised in assignment of error No. 1 filed by appellant with the Supreme Court of Pennsylvania wherein appellant complained that the Superior Court erred in failing to sustain assignment of error No. 2 filed with it by appellant as aforesaid; but the Supreme Court of Pennsylvania made no specific disposition of said assignment of error in its opinion.

That appellant again raised the federal questions involved in paragraph 11 of its petition for reargument filed with the Supreme Court of Pennsylvania under date of March 30, 1942, in the following manner:

> "(11) That your petitioner is advised, believes and therefore avers that the finding and determination of

your Honorable Court as set forth in the said opinion of March 23, 1942, to the effect that your petitioner is liable for reparations is arbitrary, unlawful and in contravention of the Fourteenth Amendment of the Constitution of the United States and of the First and Tenth Sections of the First Article of the Constitution of Pennsylvania, and is particularly contrary to the principle enunciated by the Supreme Court of the United States in Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370, 52 S. Ct. 183, 76 L. ed. 384."

but said petition was refused without comment under date of April 13, 1942.

The federal question was again raised by petitioner in exception No. 8 (printed record p. 530a) filed by it to the order of the Pennsylvania Public Utility Commission dated November 13, 1944, in the following manner:

"8. The order of the Commission entered in the above entitled proceeding under date of November 13, 1944, is arbitrary, unlawful and in contravention of Section 1 of Amendment XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that it is confiscatory and deprives the respondent of its property without due process of law, denies to respondent the equal protection of the laws and amounts to a taking of the private property of respondent without authority of law."

but said exception was ignored by the said Commission.

The federal question was again raised in exception No. 3 (printed record p. 628a) filed by petitioner to the order entered by the Pennsylvania Public Utility Commission under date of August 6, 1945, in the following manner:

"3. The Order of the Commission entered in the above entitled proceeding under date of August 6, 1945 is in contravention of Section 1 of Amendment

XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that it is confiscatory and deprives the respondent of its property without due process of law, denies the respondent the equal protection of the laws and amounts to a taking of the private property of respondent without authority of law."

but said exception was ignored by the said Commission.

The said question was also clearly raised in this cause prior to the final decision of the Supreme Court of Pennsylvania therein, in the following manner:

"(a) Paragraph 19 (h) of the Petition of Appellant for leave to appeal to the Supreme Court of Pennsylvania from the judgment of the Superior Court filed April 17, 1946, provides as follows:

'The findings and determinations as contained in the several orders of the Commission entered in this proceeding, and the affirmation thereof by the Superior Court, are in contravention of Section 1 of Amendment XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that they are confiscatory and deprive the appellant of its property without due process of law, deny to the appellant the equal protection of the laws, and amount to a taking of the private property of appellant without authority of law; and are particularly contrary to the principles enunciated by the Supreme Court of the United States in the case of Arizona Grocery Co. *vs.* Atchison, T. & S. F. Ry. Co., 284 U. S. 370, (52 S. Ct. 183, 76 L. Ed. 384).'

(b) Assignment of Error 11 filed with the Supreme Court of Pennsylvania is as follows:

'11. The affirmation by the Superior Court of the findings and determinations as contained in the sev-

eral orders of the Commission entered in this proceeding are in contravention of Section 1 of Amendment XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that they are confiscatory and deprive the appellant of its property without due process of law, deny to the appellant the equal protection of the laws, and amount to a taking of the private property of appellant without authority of law.'

(c) On page 108 of Brief for Appellant in the latest appeal in this proceeding to the Supreme Court of Pennsylvania appears the following:

'On the contrary, it is contended that the question of damages and who is entitled thereto is definitely substantive and that to refuse to apply the provisions of the Public Service Company Law of 1913 amounts to confiscation and a violation of Section 1, Amendment XIV of the Constitution of the United States and of Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, in that it deprives the Appellant of its property without due process of law and further denies to appellant the equal protection of the laws.'

(d) Paragraph 7 of the Petition of Appellant for Re-argument filed in the Supreme Court of Pennsylvania provides as follows:

'7. That your petitioner is advised, believes, and therefore avers that the determination of your Honorable Court as set forth in its said Per Curiam opinion of December 2, 1946, is arbitrary, unlawful and in contravention of the 14th Amendment of the Constitution of the United States and of the 1st and 10th Sections of the 1st Article of the Constitution of Pennsylvania, in that it is confiscatory and deprives the appellant of its property without due process of law, denies to the appellant the equal protection of the law, and amounts to a taking of the

private property of appellant without authority of law; and that the said Per Curiam opinion of your Honorable Court is particularly contrary to the principle enunciated by the Supreme Court of the United States in Arizona Grocery Co. *vs.* Atchison, T. and S. F. Rwy, 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 384.'

(e) The said question was also clearly raised in the Assignments of Error filed with the Superior Court of Pennsylvania (page 20 of Brief for Appellant filed in the Supreme Court of Pennsylvania) and also in the Brief of Appellant filed with the Superior Court of Pennsylvania (page 56 of the brief for appellant filed with the Supreme Court of Pennsylvania)."

but was decided adversely to the contention of petitioner without a specific discussion of the constitutional question.

GEORGE HENRY HUPT,
Counsel for Appellant.

APPENDIX

Opinion of the Supreme Court of Pennsylvania

(Reported 355 Pa. 377)

Per CURIAM, December 2, 1946:

At the argument of this appeal from the decision of the Superior Court, reported in 159 Pa. Superior Ct. 59, counsel for the appellant frankly stated that the purpose of the appeal was to obtain reconsideration and reversal of our decision in the case between the same parties reported in 344 Pa. 366. We have so considered the appeal and affirm the judgment on the opinion of President Judge Baldrige of the Superior Court.

Opinion of the Supreme Court of Pennsylvania

(Reported 344 Pa. 366)

OPINION by Mr. Justice PARKER, March 23, 1942:

This is an appeal by the Cheltenham & Abington Sewerage Company from an order of the Superior Court (146 Pa. Superior Ct. 274, 22 A. 2d 37) modifying an order of the Public Utility Commission (successor to the Public Service Commission) finding that the rates of that company were unreasonable, oppressive and extortionate from October 17, 1933, to January 1, 1937, and directing that reparations should be awarded for that period. The principal matter to be determined in this appeal is the earliest date from which reparations may be allowed on account of any claims made in this proceeding.

On October 6, 1930, the Public Service Commission, acting on a complaint and after hearing, directed the company to file and publish a tariff for sanitary sewerage service to yield an annual gross revenue not in excess of $36,140.00: 10 Pa. P. S. C. 502. A tariff intended to produce that rate was filed and approved by the Commission on April 13, 1931, to be effective July 1, 1931. The commission on December 11, 1934, on its own motion, by authority of Art. V,

section 3 of the Public Service Company Law, Act of July 26, 1913, P. L. 1374, instituted a proceeding inquiring into the fairness, reasonableness and justness of the rates provided by the existing tariff. This resulted in an order as to future rates dated August 30, 1935, fixing the annual allowable revenue at a maximum of $27,700. On appeal the Superior Court (Cheltenham & Abington S. Co. *v.* P. S. C., 122 Pa. Superior Ct. 252, 186 A. 149) by opinion filed July 10, 1936, increased the allowable annual gross revenue to $30,050.00. An allocatur was refused by this court. Thereupon the commission filed a report and order directing a new tariff to be filed effective January 1, 1937, in accord with its previous order as modified by the Superior Court. The company collected rates under the old tariff to that time.

On October 17, 1935, a complaint was filed with the Commission by Benjamin H. Davis, et al., under Art. V, section 5 of the Public Service Company Law to recover reparations for damages alleged to have been sustained by reason of the collection by the company of rates set forth in the tariff effective July 1, 1931. The commission, after hearing, found that reparations should be awarded from October 17, 1933,* to January 1, 1937. On appeal the Superior Court held that the complainants were not entitled to receive compensation for a period prior to December 11, 1934, the date on which the proceedings to fix future rates were initiated by the commission. It is the contention of the appellant that since the rates collected by it were imposed by virtue of a commission-made rate no reparations may be awarded prior to the effective date of the new tariff, January 1, 1937; in short, that the complainants are not entitled to any reparations. We do not agree with either this contention or the position of the Superior Court, but are of the opinion that the right to reparations does not extend to a period prior to August 30, 1935, the date on which the commission filed its order directing a reduction in allowable gross revenue.

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* The statutory limit of two years prior to filing claim fixed by said Para. 5.

The rates prescribed by the commission in 1931 after hearing were "commission-made" rates as that term is used in utility law. The rates so fixed could not be other than commission-made rates for that agency fixed the rate base and after estimating an amount allowable for expenses of operation prescribed the gross annual revenue which the utility should collect. We do not regard it of any significance that the tariffs designed to yield the specified gross annual revenue were prepared by appellant and approved by the Commission rather than that they were set by the commission in the first instance. This was a mere matter of procedure. While the company was permitted to prepare the schedule it was approved by the Commission as being in accord with their prior order. The company consequently was entitled to rely upon the declaration of the commission as to what was a lawful and reasonable rate until a change was made by the commission acting in its quasi legislative capacity.

Mr. Justice Roberts in the leading case on the subject (Arizona Grocery Co. *v.* Atchison, T. & S. F. Ry., 284 U. S. 370, 386-389, 52 S. Ct. 183) said: "When . . . the (Interstate Commerce) Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the Legislature, and its pronouncement has the force of a statute. This court has repeatedly so held with respect to the fixing of specific rates by state commissions, and in this respect there is no difference between authority delegated by state legislation and that conferred by congressional action. . . . As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and, if the order merely sets limits, it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi judicial capacity, ignore its own pronouncement promulgated in its quasi legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." The same principle was followed in this state by the Superior Court: Penna. R. R. Co. *v.*

P. S. C., 125 Pa. Superior Ct. 558, 190 A. 367; B. & O. R. R. Co. *v.* P. U. C., 136 Pa. Superior Ct. 517, 7 A. 2d 488.

There was important distinctions between proceedings to fix future rates under section 3 of Art. V of the Public Service Company Law and those for reparations under section 5 of the same article. "The object of a rate proceeding is to prevent a public wrong for the future; reparation redresses a private wrong of the past. The findings on the issues actually involved in the rate case furnished no basis either for awarding or refusing reparation; there has, as yet, been no specific finding that the rates were unreasonable in the past. By the express provisions of the statute nothing can be done toward the redressing of the wrong suffered through the exaction of unreasonable rates until the commission, after hearing, 'shall determine that any rates which have been collected . . . were . . . unreasonable,' et cetera. A question of reparation cannot properly be determined by the commission until it has been presented to it in the manner prescribed by the act, nor should it be prejudiced, or the door closed against it, by a declaration in advance of a hearing": Centre Co. Lime Co. *v.* P. S. C., 96 Pa. Superior Ct. 590, 599; 103 Pa. Superior Ct. 179, 157 A. 815. Also see New York & Penna. Co. *v.* N. Y. C. R. R. Co., 267 Pa. 64, 100 A. 286. Nevertheless a commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the commission. The utility was entitled to reply on the order of 1931 until August 30, 1935, but thereafter might be liable for reparations.

At what date did the tariff of 1931 cease to protect the company from claims for reparations? We are of the opinion that protection extended to August 30, 1935, the date when the commission, acting under the authority granted to it by the legislature, declared that the former controlling rates were unreasonable and should be reduced. The appellant then knew that the commission after full hearing had determined that the rates were too high. It knew that the legislature had delegated to the commission power and authority to act for it and make that determina-

tion as well as the power to make an order for reparations. In prior decisions the Superior Court properly so held: Penna. R. R. Co. *v.* P. S. C., supra; B. & O. R. R. Co. *v.* P. U. C., supra.

The company, appellant, argues that since the order of the Public Utility Commission made August 30, 1935, was appealed to the Superior Court and was modified by that court on July 10, 1936, and the tariff pursuant to that order was not effective until January 1, 1937 (application for an allocatur in the meantime having been made to and refused by the Supreme Court), the old tariff of 1931 entitled it to collect the rates fixed by it until the new tariff was effective. The Superior Court properly rejected that contention. If that theory is sound the complainants would be deprived of any right to claim reparations. It was the Public Service Commission to whom the legislature delegated the authority to determine and fix just and reasonable rates to be charged by certain utilities. In acting under that authority the commission performed a quasi legislative function and its decision, as in all rate cases, is in effect an enactment which remains the law until it is changed by the legislature acting directly or through its agent the commission. Consequently, when the commission determines an existing rate to be unjust and unreasonable that change has the same effect as any other change in the law by the legislature. The mere fact that the courts may review decisions of the commission does not affect the fact that there has been an actual change in the law insofar as it affects the particular utility. The review of orders of the commission by the courts is a judicial function whereby it is determined whether the commission has acted within its delegated powers and within the constitution.

When the commission on August 30, 1935, determined that the rates were unjust and unreasonable that constituted a new enactment fixing the relative rights of the utility and its customers. So far as the decision of the commission was lawful it remained in force as of August 30, 1935. On that date the utility had notice that if it continued to collect for service under the old tariff it might

be called upon to account by way of reparations. The mere fact that the order was subject to review did not affect that result. The situation is comparable to that which exists when the constitutionality of an act of the legislature is challenged by an appeal to the courts. If the act is sustained it remains effective as of the date originally fixed by the legislature. Just so here, the protection which the company enjoyed under the tariff of 1931 ceased as of August 30, 1935. The delay necessitated by appeals to the courts, often covering a long period, should not be allowed to prejudice the rights of customers of the utility unless the law demands such an interpretation, when in the end a change is sustained as was the case here.

The Superior Court, however, in part sustained the view of the Commission and held that the initiation of an investigation by the commission of the justness and reasonableness of the rates constituted a change and served as a warning to the utility by reason of special circumstances to which we have not heretofore referred.

When the rates were fixed by the commission in 1930 appellant had a contract with Cheltenham Township for sewage disposal calling for a fixed sum per year plus a proportionate part of any amount the township might have to pay the City of Philadelphia for conveyance of sewage through the latter's sewers. The exact obligation under this contract being in doubt, the commission in its opinion stated: "Under these circumstances the amount claimed by respondent, $10,940 will be allowed until the exact amount is determined, at which time a rate adjustment, if necessary, can be made." It developed that the allowance was $3,000 too high. Nothing was done by the commission until 1934 when it initiated the proceeding to determine the fairness and justness of the appellant's rates. At that time the whole subject of rate base and allowable expenses was investigated and the final result reached was dependent only in part upon a reduction in the amount allowable for payment to Cheltenham Township for disposal of sewage.

The commission in 1931 not only made an order intended to furnish a basis for a tariff but it joined the utility in pre-

scribing such a tariff and allowed it to remain unchanged for about three and one-half years. The tariff became binding on utility and customer until circumstances required a reexamination of the subject and a conclusion was reached or the company filed a new tariff. It might have developed that the rates fixed were too high or too low and either the customer or the utility might profit by the errors of judgment. It is true that here experience demonstrated that the rates were too high but that is not an unusual situation. It is inevitable that in any rate making proceeding few factors can be determined with exactness and when an error appears it may affect adversely either customer or utility. The commission merely referred in its report to the item of rental to be paid to the township without pretending to make any specific reservation of the matter. It recited the fact that a change on that account might or might not be necessary. When the commission did institute a new investigation, it did not confine its attention to the actual amount paid for rental but explored the entire field usually covered in rate making inquiries. The result of the proceeding was that the annual allowable revenue was reduced in an amount approximately double the excess collected for rental. Insofar as the change arose from other matters than excess on account of rental the situation was just the same as in other cases involving a commission-made rate. Rates having in other respects the attributes of commission-made rates do not lose their effect as such by an indefinite expression of opinion that some of the factors on which they are based are variable and may not stand a pragmatic test, a situation which is always implied.

To sustain the position of the Superior Court would be to give a retroactive effect to the order of August 30, 1935, without notice to the utility. The mere institution of an inquiry did not constitute notice that a departure would be made from the tariff established by the commission in its quasi legislative capacity. The situation is comparable to the introduction of a bill in the legislature. It may or may not become a law. Here the first notice to the utility that the rates were too high was on August 30, 1935.

The order of the commission must be modified by fixing August 30, 1935, as the earliest date from which the Cheltenham & Abington Sewerage Company is liable for reparations.

The decree of the Superior Court is affirmed as modified, the costs of this appeal to be divided equally between the appellants and the complainants.

FILED
APR 9 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 1223 Term, 194 .

CHELTENHAM AND ABINGTON SEWERAGE COMPANY,

Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellee.

BRIEF ON BEHALF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM.

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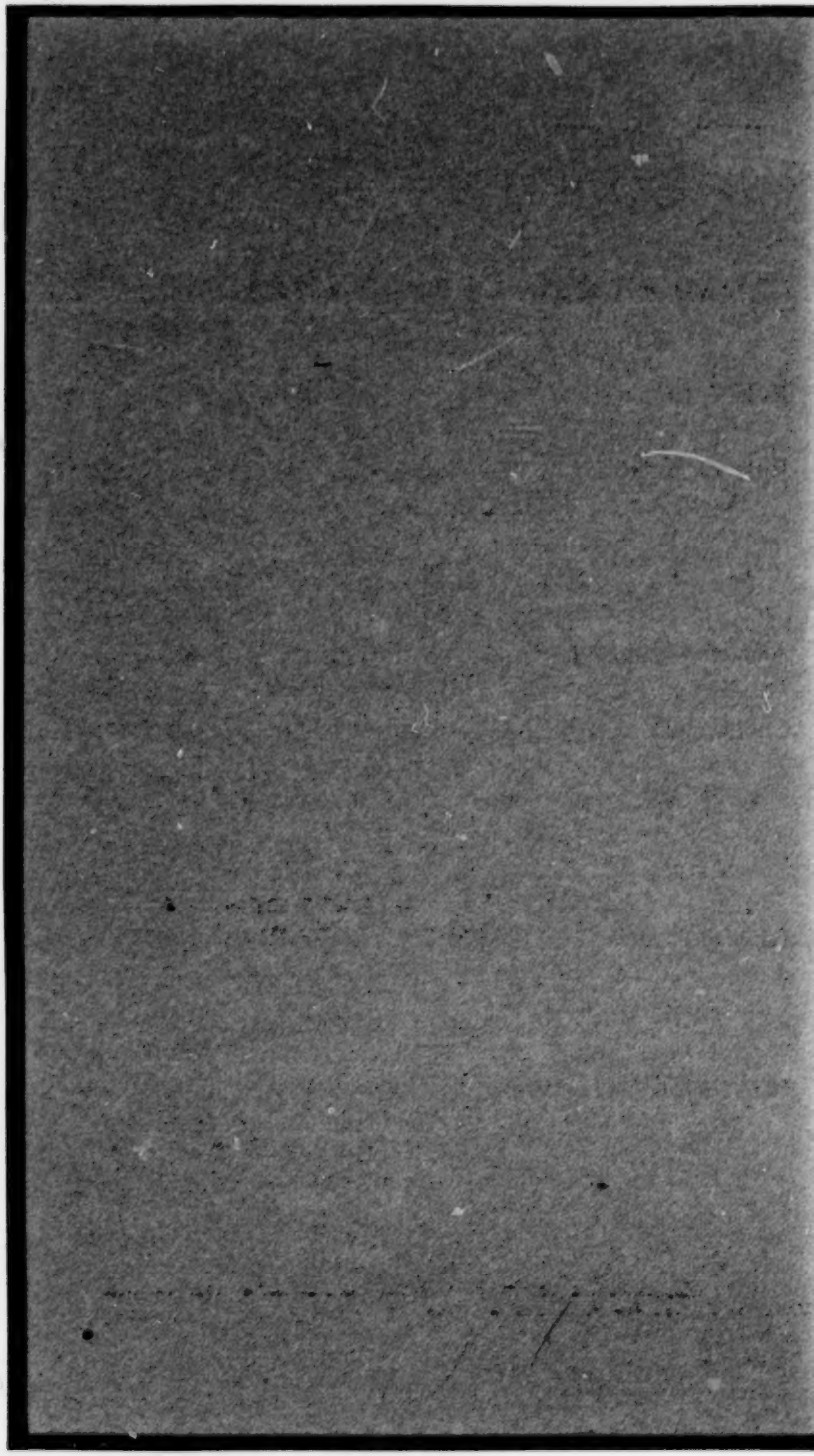

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. Term,

CHELTENHAM AND ABINGTON SEWERAGE COMPANY,
Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee.

BRIEF ON BEHALF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM.

THE STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM WAS FILED OUT OF TIME AND SHOULD NOT BE RECEIVED.

The statement Opposing Jurisdiction and Motion to Dismiss or Affirm in this proceeding was filed by the Pennsylvania Public Utility Commission with the Prothonotary of the Supreme Court of Pennsylvania on March 19, 1947, and a copy thereof was received by the attorney for the appellant on the same day.

A copy of the Statement of the Appellant as to jurisdiction of the Supreme Court of the United States was served upon counsel for the Pennsylvania Public Utility Commis-

sion on February 11, 1947 and on February 21, 1947, a document entitled "Statement Opposing Jurisdiction of Supreme Court of the United States" was filed by counsel for the Pennsylvania Public Utility Commission with the Prothonotary of the Supreme Court of Pennsylvania and a copy thereof served upon counsel for appellant. The document which this brief opposes the reception of is in effect a revision of the document entitled "Statement Opposing Jurisdiction of the Supreme Court of the United States" filed and served on February 21, 1947, plus a motion to dismiss or affirm.

Rule 7, paragraph 3 of the Revised Rules of the Supreme Court of the United States provides, inter alia, as follows:

> "A motion by Appellee to dismiss an appeal will be received in advance of the Court's ruling upon the jurisdictional statements only when presented in the manner provided by Rule 12, paragraph 3."

Rule 12, paragraph 3, of said Rules provides as follows:

> "Within 15 days after such service the Appellee may file with the Clerk of the Court possessed of the record, and serve upon the Appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made it may be opposed as provided in Rule 7, Paragraph 3."

Therefore, in view of the fact that the Statement Opposing Jurisdiction and Motion to Dismiss or Affirm filed by the Pennsylvania Public Utility Commission under date of March 19, 1947, was not filed within fifteen days after the service upon the appellee of appellant's "Statement as to Jurisdiction of Supreme Court of the United States", it is obvious that the same was filed out of time and we therefore submit, in accordance with the provisions of Rule 7,

paragraph 3 of the Revised Rules of the Supreme Court of the United States, that it should not be received at this late date.

However, in the event your Honorable Court should be inclined to receive the said statement and motion in spite of the lateness of its filing, appellant desires to submit the following brief in opposition thereto.

I.

The statements contained in Part I of the Statement Opposing Jurisdiction here involved are substantially correct, with the following exceptions:

(1) In the second paragraph it is stated that the company did not follow the Commission order of August 30, 1935, but appealed to the Superior Court of Pennsylvania, which "modified" the findings of the Commission. We submit that the use of the word "modified" in this connection is entirely erroneous for the reason that the Superior Court expressly reversed the said order of the Commission in the following language:

> "The order of the Public Service Commission is reversed."

We submit that this is quite material in considering appellant's contention that the Commission Order of August 30, 1935, became a nullity as the result of the reversal thereof by the Superior Court, and that to hold that reparations began to accrue on the date thereof, but are to be measured by the rates which became effective January 1, 1937, as the result of an order of the Commission of November 30, 1936, which followed the said opinion of the Superior Court, is to give life to a nullity, particularly since the said court, by an Act of the Legislature of Pennsylvania approved June 12, 1931, P. L. 530, 66 P. S. 836, was required to inquire not

only whether the order appealed from was reasonable and in conformity with law, but also to determine, "on its own independent judgment", whether the findings made and the valuations and rates fixed by the Commission were reasonable and proper. That Act constituted the Superior Court an arm of the legislature and therefore, when it reviewed the order of the Commission of August 30, 1935, it acted in a quasi-legislative capacity, rather than a quasi-judicial one, and its decision superseded and nullified completely the said order of the Commission.

(2) Also, in the second paragraph of Part I of the Appellee's statement it is stated in effect that the commission issued a new report and order on November 30, 1936, directing a new tariff to be filed, effective January 1, 1937, "in accord with its previous order as modified by the Superior Court". With respect to said statement we incorporate here what has been said above to the effect that the Commission order of August 30, 1935, became a nullity by reason of its reversal by the Superior Court and, therefore, the filing of the tariff ordered by the Commission order of November 30, 1936, could not and was not "in accord" with the said order of August 30, 1935. As a matter of fact, the Commission order of August 30, 1935, allowed a gross annual revenue of only $27,700. whereas the Commission order of November 30, 1936, based upon the Superior Court decision of July 10, 1936 (122 Pa. Superior Ct. 252), allowed a gross annual revenue of $30,050.

(3) Another erroneous statement appears in the fourth paragraph of Part I of appellee's Statement Opposing Jurisdiction to the effect that in this case there are two Commission-made rates "the first being established by an order of October 6, 1930, and the second by an order of August 30, 1935." We agree that there are two rates here involved and that the first was established by a Commission order of October 6, 1930, but the second rate here involved was established by the Commission order of November 30, 1936,

and directed by said order to be made effective as of January 1, 1937.

(4) We agree, as stated in the fifth paragraph of Part I of appellant's statement opposing jurisdiction that the reparations in issue were ordered by the Supreme Court of Pennsylvania on the basis of the Commission's action of August 30, 1935, but this, we submit, had the effect of making retroactive to that date a rate which was not established until November 30, 1936, and not ordered to become effective until January 1, 1937 which determination, as hereinafter discussed, we submit was contrary to the principles established by your Honorable Court in the case of Arizona Grocery Co. vs. Atchison, Topeka and Sante Fe Railway Co., 284 U. S. 370, 52 Sup. Ct. 183.

II.

Part II of Appellee's Statement Opposing Jurisdiction states in effect that the Supreme Court of Pennsylvania in determining the period for which appellant is liable for reparations, applied the principles established by your Honorable Court in Arizona Grocery Co. vs. Atchison, Topeka and Sante Fe Railway Co., 284 U. S. 370, and quotes a number of excerpts therefrom. In reply we submit that the Supreme Court of Pennsylvania has acted contrary to the principles thus established and that perhaps the most important of such principles and the ones upon which the Appellant particularly relies, have been omitted by the Appellee and are as follows:

> "Where the commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as

> to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the commission now holds it should have decided in the earlier proceeding to be a reasonable rate.
>
> • • •
>
> Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed."

Briefly, in the light of said principles, our contention is that in its order of October 6, 1930, the Commission, acting in its quasi-legislative capacity, having authorized the collection by appellant of certain rates designed to yield a gross annual revenue not in excess of $36,140. and subsequently approved a tariff of rates filed as being in compliance therewith and having later, on November 30, 1936, again acting in its quasi-legislative capacity, issued an order establishing new rates to become effective January 1, 1937, the said Commission was without any power or authority, acting in its quasi-judicial capacity, to hold Appellant liable for reparations for a period beginning August 30, 1935, and thus making retroactive to said date the rates which by its order of November 30, 1936, were expressly ordered to become effective on January 1, 1937.

The appellee also states that the Supreme Court of Pennsylvania (344 Pa. 366, 371, 372) stated that the legislative process in Pennsylvania is complete when the Commission finds a new rate and quotes a lengthy excerpt from the said opinion in support of said statement. Be that as it may, we submit that if the quoted language so holds it is erroneous in the light of the Act of the Legislature of Pennsylvania approved June 12, 1931, P. L. 530, 66 P. S. 836, hereinabove referred to, which provides, inter alia, as follows:

> "At the hearing of the appeal, the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law: Provided, however, That in every appeal taken, including those already taken and undetermined, involving a question of the reasonableness of rates, whether such appeal shall have been taken by a complainant or by a public service company, it shall be the duty of the court to consider the entire record of the proceedings before the commission, including the testimony, and, on its own independent judgment, to determine whether or not the findings made and the valuations and rates fixed by the commission are reasonable and proper."

and contravenes the Fourteenth Amendment of the Constitution of the United States in that it is confiscatory and deprives the Appellant of its property without due process of law, denies to the appellant the equal protection of the law, and amounts to a taking of the private property of appellant without authority of law, and furthermore acted contrary to the principles enunciated by your Honorable Court in the leading case of Arizona Grocery Co. vs. Atchison, Topeka and Sante Fe Railway Co., supra.

In Part II of its Statement Opposing Jurisdiction the appellee also states that "it is clear that in the case at bar the appellant utility refused to follow a commission-made rate until after the rate had been reviewed by the Appellate Courts, all in total disregard of the holding of the United States Supreme Court in the Arizona Grocery case, supra, that a Commission acting under this type of statutory power could * * * substitute a new rule of conduct as often as occasion might require". We submit that said statement is a distortion of the fact and the law. As to the fact, the Appellant refused to make effective the rate established by the Commission order of August 30, 1935, and was justified in such refusal by the opinion of the Superior Court of

July 10, 1936, supra, wherein a higher rate was authorized and which is the rate which was made effective, in accordance with the commission order of November 30, 1936, on January 1, 1937. As to the law, we emphatically deny that such refusal was in disregard of the holding of your Honorable Court in the Arizona Grocery case. While your Honorable Court did say that the Commission there could repeal an order "as it effected future action and substitute a new rule of conduct as often as occasion might require", you did not hold that a utility was obliged to comply with such order without any right of appeal.

We submit it is clear beyond a doubt that the Supreme Court of Pennsylvania in fixing August 30, 1935, as the beginning of the period during which Appellant is liable for reparations, instead of following "faithfully the lead of the Supreme Court of the United States" as stated by the appellee, acted contrary to the principles established by your Honorable Court.

III.

In Part III of Appellee's Statement Opposing Jurisdiction it is stated that the Pennsylvania Supreme Court's interpretation of Section 313 (a) of the Public Utility law as procedural is not a violation of the Fourteenth Amendment of the Constitution of the United States and presents no Federal question. With this, of course, Appellant vigorously disagrees, and with the argument Appellee makes in support thereof. We assume that instead of the word "interpretation" the Appellee intended to use the word "application", since the question at issue was really whether Article V, Section 5, of the Public Service Company Law of 1913 or Section 313 (a) of the Public Utility Law of 1937, should be applied, and the Supreme Court of Pennsylvania affirmed the Public Utility Commission's action in applying the latter.

It is appellant's contention that since the proceeding at

bar had its inception upon the filing of a petition for reparations under date of October 17, 1935, more than a year and a half prior to the effective date of the Public Utility Law of 1937, that the proceeding must be considered and disposed of under the law in existence upon the date of such filing, i.e., the Public Service Company Law of 1913, Article V, Section 5 of which, being the section relating to reparations, is quoted in part in Appellee's Statement Opposing Jurisdiction and will not be repeated here. As a matter of fact, the Superior Court of Pennsylvania in the first phase of this proceeding so held: Cheltenham and Abington Sewerage Company vs. Pa. Public Utility Commission, 146 Pa. Superior Ct. 274, 282.

Article V, Section 5, of the Public Service Company Law of 1913, in brief, provides that only such complainant petitioners as have actually sustained damages and who have filed their complaint or petition within two years from the time when the cause of action accrued, are entitled to reparations, and these provisions, we submit, are definitely and unequivocally substantive in nature and that the Legislature had no power, without violating the constitutional rights of this appellant, to alter these substantive provisions as to a proceeding which had been instituted while the Public Service Company Law of 1913 was in effect.

We submit that to refuse to apply the provisions of the Public Service Company Law of 1913 amounts to confiscation and a violation of Section 1 of Amendment XIV of the Constitution of the United States in that it deprives the appellant of its property without due process of law and further denies to appellant the equal protection of the laws, since under the Public Service Company Law of 1913 only those patrons of a public utility who have filed with the Commission their complaint or petition within two years from the time when the cause of action accrued and only such complainant petitioners who have actually sustained damages, are entitled to reparations, whereas Section 313 (a) of the Public Utility Law of 1937 provides that "any

order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the Public Utility".

Article V, Section 5, of the Public Service Company Law of 1913 did not, as contended by the Appellee, merely provide a procedure to be followed in reparation cases; it actually created and defined rights. Procedural law, we submit, merely prescribes the method of enforcing rights: 36 C. J. 963.

Appellee states in effect in its Statement Opposing Jurisdiction that the application of section 313 (a) of the Public Utility Law of 1937 "did not impose upon appellant any liability greater than that which existed at common law, or than that which existed under the Public Service Company Law of 1913". That statement, we submit, is absolutely contrary to the fact. At the common law only those patrons were entitled to reparations who could prove that they had actually sustained damages. Under the Public Service Company law only those complainant petitioners who have filed their petitions within a period of two years after the cause of action accrued and who have actually sustained damages are entitled to reparations. However, under Section 313 (a) of the Public Utility Law of 1937 all of the patrons subject to the same rate of a public utility are entitled to reparations regardless of whether or not they filed a petition therefor and regardless of any proof of any damages having been sustained by them.

This question is very vital to appellant since the record in this proceeding is absolutely devoid of any proof of damages actually sustained by the complainant petitioners.

CONCLUSION.

In the light of the foregoing we earnestly urge that the motion to dismiss or affirm be dismissed.

Respectfully submitted,

GEORGE HENRY HUFT,
Attorney for Appellant.

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APR 9 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1223

CHELTENHAM AND ABINGTON SEWERAGE COMPANY,

Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

CHARLES E. THOMAS,
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Assistant Counsel;
WILLIAM MCKELVY RUTTER,
Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1223

CHELTENHAM AND ABINGTON SEWERAGE COMPANY,

Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION

Appellee respectfully submits that the questions presented by the appellant's jurisdictional statement have been settled adversely to appellant's position by decisions of this court; and in any event, the questions do not raise a substantial Federal question.

I

Nature of the Rates upon Which Reparations Were Ordered and the Extent of Reparations

The Public Service Commission of Pennsylvania on October 6, 1930 (10 Pa. P. S. C. 502) issued an order whereby it directed that the rates of Cheltenham and Abington Sewerage Company (appellant herein) be reduced to provide an allowable gross annual revenue of $36,140. The

company thereupon filed a tariff designed to yield the gross annual revenue permitted under this order and the tariff became effective July 1, 1931. The company continued to collect rates under this tariff until January 1, 1937.

On December 11, 1934, the Public Service Commission instituted a proceeding to determine the fairness, reasonableness, and justness of this commission-made rate. As a result of this new investigation, the Commission issued an order on August 30, 1935 as to future rates fixing the annual allowable revenue at a maximum of $27,700. (14 Pa. P. S. C. 76). The company did not follow the Commission order, but appealed to the Superior Court of Pennsylvania, which modified the findings of the Commission, and permitted an allowable gross annual revenue of $30,050. *Cheltenham and Abington Sewerage Co.* v. *P. S. C.*, 122 Pa. Super. 252, 186 A. 149 (1938). The Supreme Court of Pennsylvania refused to allow an appeal, and the order of the Superior Court became final on September 17, 1936. The Commission then issued a new report and order on November 30, 1936 (16 Pa. P. S. C. 118), directing a new tariff to be filed effective January 1, 1937 in accord with its previous order as modified by the Superior Court. In compliance therewith, the appellant filed a new tariff which became effective January 1, 1937.

The reparations, as finally ordered by the Supreme Court of Pennsylvania, are for the period August 30, 1935 to January 1, 1937, and resulted from a complaint filed with the Commission on October 17, 1935, subsequent to the Commission order of August 30, 1935, which found that appellant's rates were unreasonable and directed that a new tariff be filed.

It is to be noted that in this case there are two commission-made rates, the first being established by an order of October 6, 1930, and the second by an order of August 30, 1935. The second rate so fixed was lower than the first.

The reparations in issue were ordered by the Supreme Court of Pennsylvania in *Cheltenham and Abington Sewerage Co.* v. *Pa. P. U. C.*, 344 Pa. 366, 25 A. 2d 334 (1942), on the basis of the Commission action of August 30, 1935, the court holding that the Commission's action was tantamount to an act of the Legislature which the appellant was bound to follow and which in substance repealed the first commission-made rate.

At this stage of the proceeding the Supreme Court of the United States allowed an appeal by the Company, but the appeal was dismissed on October 12, 1942, 317 U. S. 588, 63 Sup. Ct. 38, 87 L. Ed. 482, for want of a final judgment.

The next phase of this case involved the amount of reparations to be paid and the patrons of the company entitled thereto. The Superior Court of Pennsylvania, in *Cheltenham and Abington Sewerage Company* v. *Pennsylvania Public Utility Commission*, 159 Pa. Super. 59, 46 A. 2d 583 (1946), affirmed the final order of the Commission of October 1, 1945 awarding reparations to all patrons in specific amounts. On appeal the Supreme Court of Pennsylvania affirmed the decision of the Superior Court in a *per curiam* opinion. 355 Pa. 377, 49 A. 2d 707 (1946).

II

The Supreme Court of Pennsylvania in Determining the Period for Which the Appellant Was Liable for Reparations Applied the Principles Established by the Supreme Court of the United States in Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railway Co., 284 U. S. 370 (1932).

The leading applicable decision of the Supreme Court of the United States involving reparations upon commission-made rates is that in *Arizona Grocery Co.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 284 U. S. 370, 52 Sup. Ct.

183 (1932). That case dealt with reparations on shipments which moved under rates approved or prescribed by the Interstate Commerce Commission as reasonable. The several quotations from the case which follow establish the law of reparations based upon commission-made rates:

One page 383 of 284 U. S. this court said:

> "The exaction of unreasonable rates by a public carrier was forbidden by the common law. Interstate Commerce Commission *v.* Baltimore and Ohio R. Co., 145 U. S. 263, 275. * * *"

On page 384:

> "* * * Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. * * *"
>
> "The act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. * * *"

On page 386:

> "* * * When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute.* * *"

On page 388:

> "* * * This is true because the Commission in naming the rate, speaks in its quasi-legislative capacity. * * *"
>
> "* * * By the amendatory legislation Congress has delegated to the Commission as its administrative arm its undoubted power to declare, within constitutional limits, what are lawful rates for the services to be performed by the carriers. * * *"

And on page 389:

> "As respects its future conduct the carrier is entitled to rely upon the declaration as to what will be a unlawful, that is, a reasonable, rate; and if the order merely sets limits it is entitled to protection if it fixes a rate which falls within them. * * *."
>
> "* * * It [Interstate Commerce Commission] could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

This court was, of course, speaking of the Interstate Commerce Act, when it referred to legislation; but that Act is *ejusdem generis* with the Pennsylvania Public Utility Law, and its prototype, the Pennsylvania Public Service Company Law. Article V, Section 3, of The Public Service Company Law, the Act of July 26, 1913, P. L. 1374, 66 Purdon's Pa. Stat. Ann. Sections 491-494 (repealed by the Public Utility Law, the Act of May 28, 1937, P. L. 1053, Section 1502, 66 P. S. Section 1562) reads in parts as follows:

> "Whenever the commission shall determine, after hearing, had upon its own motion, or upon complaint, that the rate, fares, tolls or charges established * * * by any public service company * * * are unjust or unreasonable * * *—then the commission shall determine, and prescribe by a specific order, the maximum, just, due equal, and reasonable rates * * * to be thereafter established * * * or collected for the service to be performed; * * *."

The Supreme Court of Pennsylvania, in its decision in the first stage of this proceeding, *Cheltenham and Abington Sewerage Co.* vs. *P. U. C.*, 344 Pa. 366, 25 A. 2d 334 (1942), determined that reparations were payable and in so doing followed the principles quoted, supra, from the Arizona

Grocery Company case. This is apparent from the following language from the Pennsylvania Supreme Court opinion:

On page 369 of 344 Pa. the court said:

> "Mr. Justice Roberts in the leading case on the subject (Arizona Grocery Co. v. Atchison, T. & S. F. Ry., 284 U. S. 370, 386-389, 52 S. Ct. 183) said: 'When . . . the [Interstate Commerce] Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the Legislature, and its pronouncement has the force of a statute. This court has repeatedly so held with respect to the fixing of specific rates by state commissions, and in this respect there is no difference between authority delegated by state legislation and that conferred by congressional action . . . As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and, if the order merely sets limits, it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi judicial capacity, ignore its own pronouncement promulgated in its quasi legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.' The same principle was followed in this state by the Superior Court; Penna. R. R. Co. v. P. S. C., 125 Pa. Superior Ct. 558, 190 A. 367; B. & O. R. R. Co. v. P. U. C., 136 Pa. Superior Ct., 517, 7 A. 2d 488."

On pages 371 and 372 of 344 Pa., the court expressly stated that the legislative process in Pennsylvania is complete when the Commission finds a new rate:

> "The company, appellant, argues that since the order of the Public Utility Commission made August 30, 1935, was appealed to the Superior Court and was modified by that court on July 10, 1936, and the tariff pursuant to that order was not effective until January

1, 1937, (application for an allocatur in the meantime having been made to and refused by the Supreme Court), the old tariff of 1931 entitled it to collect the rates fixed by it until the new tariff was effective. The Superior Court properly rejected that contention. If that theory is sound the complainants would be deprived of any right to claim reparations. It was the Public Service Commission to whom the legislature delegated the authority to determine and fix just and reasonable rates to be charged by certain utilities. In acting under that authority the commission performed a quasi legislative function and its decision, as in all rate cases, is in effect an enactment which remains the law until it is changed by the legislature acting directly or through its agent the commission. Consequently, when the commission determines an existing rate to be unjust and unreasonable that change has the same effect as any other change in the law by the legislature. The mere fact that the courts may review decisions of the commission does not affect the fact that there has been an actual change in the law insofar as it affects the particular utility. The review of orders of the commission by the courts is a judicial function whereby it is determined whether the commission has acted within its delegated powers and within the constitution.

"When the commission on August 30, 1935, determined that the rates were unjust and unreasonable that constituted a new enactment fixing the relative rights of the utility and its customers. So far as the decision of the commission was lawful it remained in force as of August 30, 1935. On that date the utility had notice that if it continued to collect for service under the old tariff it might be called upon to account by way of reparations. The mere fact that the order was subject to review did not affect that result. The situation is comparable to that which exists when the constitutionality of an act of the legislature is challenged by an appeal to the courts. If the act is sustained it remains effective as of the date originally fixed by the legislature. Just so here, the protection

> which the company enjoyed under the tariff of 1931 ceased as of August 30, 1935. The delay necessitated by appeals to the courts, often covering a long period, should not be allowed to prejudice the rights of customers of the utility unless the law demands such an interpretation, when in the end a change is sustained as was the case here."

It is clear that in the case at bar the appellant utility refused to follow a commission-made rate until after the rate had been reviewed by the appellate courts, all in total disregard of the holding of the United States Supreme Court in the *Arizona Grocery* case, *supra*, that a commission acting under this type of statutory power could—"• • • substitute a new rule of conduct as often as occasion might require, • • •."

It is apparent that the Supreme Court of Pennsylvania, by fixing August 30, 1935 as the earliest date from which appellant is liable for reparations, followed faithfully the lead of the Supreme Court of the United States.

III

The Pennsylvania Supreme Court's Interpretation of Section 313(a) of the Public Utility Law as Procedural Is Not a Violation of the Fourteenth Amendment to the Constitution of the United States and Presents No Federal Question.

The reparation complaint in this case was filed on October 17, 1935 under Article V, Section 5, of The Public Service Company Law, the Act of July 26, 1913, P. L. 1374, 66 P. S. Section 511, which reads in part as follows:

> "If, after hearing, upon complaint or upon its own motion, the commission shall determine that any rates which have been collected, or any acts which have been

done or omitted to be done, or any regulations, classifications, or practices which have been enforced for, or in relation to, any service rendered after this act becomes effective, by any public service company complained of, were in violation of any order of the commission, or were unjust and unreasonable or unjustly discriminatory, or unduly or unreasonably preferential; or, in like manner, shall find that the rates so collected are in excess of the rates contained in the tariffs or schedules of any such public service company on file or posted, and in effect and applicable at any time the said service was rendered,—the commission shall, upon petition, have the power and authority to make an order for reparation, awarding and directing the payment to any such complainant, petitioner, within a reasonable time specified in the order, of the amount of damages sustained in consequence of said unjust, unreasonable, or unlawful collections, acts or omissions, regulations, classifications or practices, of such public service company: Provided, That such damages have been actually sustained by such complainant petitioner."

The last phase of this proceeding, which determined the individuals to whom reparations were to be awarded, was conducted after The Public Service Company Law was repealed by the Public Utility Law, the Act of May 28, 1937, P. L. 1053. The Public Utility Commission therefore applied Section 313(a) of the Public Utility Law, 66 P. S. Section 1153(a), which reads in part as follows:

"• • • Any order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility. • • •."

The Pennsylvania Superior Court upheld the Commission and interpreted Section 313(a) of the Public Utility Law, quoted *supra*, as procedural in *Cheltenham and Abing-*

ton Sewerage Co. v. *Pa. P. U. C.*, 159 Pa. Super. 59, 46 A. 2d 583, saying at page 62:

"• • • Appellant argues that under that section [Art. V, Sec. 5, Public Service Company Act] reparations cannot be granted legally to other than a complainant, who has filed a petition within the period named therein, and that the commission erred in applying section 313 [(a)] of the Public Utility Act of May 28, 1937, P. L. 1053, 66 P. S. § 1153(a). The pertinent portion of that section reads: 'Any order of the commission awarding a refund shall be made for and on behalf of *all* patrons subject to the same rate of the public utility.' (Italics supplied). We pointed out in the former appeal (146 Pa. Superior Ct. 274, 22 A. 2d 37) that the approved practice in conducting reparation complaints is in two steps: '. . . first, hearing and determining whether the rate paid in the past was unjust or unreasonable, and, second, hearing and determining the individual claims for refund of both *complainant and noncomplainant patrons* of the utility . . . If reparations are ordered nothing which subsequently transpires before the commission will eliminate the obligation so declared, unless it happens that every patron claiming a refund either can be shown delinquent in payment of the rates charged or is met with an equivalent counterclaim due the utility.' (Italics supplied.) We previously had given expression to the same view in Manning et al. *v.* Newville Water Company, 111 Pa. Superior Ct. 229, 169 A. 254.

"The portion of section 313 to which we have referred is procedural and the commission, therefore, gave effect in the pending litigation to the prevailing law is so far as possible, as we did in the last appeal (146 Pa. Superior Ct. 283, supra) where we held it was our duty to give effect to section 1107 of the Public Utility Law, altering the scope of our review of rate cases, and that was in accordance with legislative sanction. Section 1404 of the Act of 1937, 66 P. S. § 1534, provides: 'All litigation, hearings, investigations, and other proceedings whatsoever, pending

> under any act repealed by this act, shall continue and remain in full force and effect, and *may be continued and completed under the provisions of this act . . .*' (Italics supplied.) Such a retroactive application concerning procedural matters is not unconstitutional as there is no vested right in any specific type of proceeding: Lewis *v.* Penna. R. R. Co., 220 Pa. 317, 322, 69 A. 821."

The Superior Court's opinion was affirmed by the Supreme Court of Pennsylvania in a *per curiam* opinion at 355 Pa. 377, 49 A. 2d 707 (1946), and it is from this decision that the instant appeal comes.

The appellant contends that this interpretation of Section 313(a) of the Public Utility Law violates the Fourteenth Amendment to the Constitution of the United States. We submit that such contention is without merit. The Pennsylvania courts found that the method of pursuing a cause of action to judgment was procedural, and this interpretation did not affect the cause of action itself. The cause of action in the instant case is the right of appellant's patrons to reparations, and this right existed at common law. *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844 (1892). Article V, Section 5, of The Pennsylvania Public Service Company Law, cited *supra*, made this cause of action statutory and provided a procedure to be followed in reparation cases. The Superior Court of Pennsylvania interpreted this statutory provision as entitling *all* patrons to reparations regardless of whether each has filed a petition. *Manning, et al.* v. *Newville Water Company*, 111 Pa. Super, 229, 169 A. 254 (1933), and reiterated this position in its opinion in the instant case. However, Section 313 (a) of the Public Utility Law, cited and quoted *supra*, replaced Article V, Section 5, of The Public Service Company Law and states in clear and unquestionable language the same procedure which had

been followed and upheld under The Public Service Company Law.

It is apparent that the Supreme Court of Pennsylvania, in affirming the Superior Court's interpretation of Section 313 (a) of the Public Utility Law as procedural, did not impose on appellant any liability greater than that which existed at common law, or than that which existed under The Public Service Company Law. It is a fundamental principle of law that the legislature can change procedure so long as procedural due process is afforded.

The appellant has been afforded every protection extended by the Constitution of the United States, and it is now attempting to alter the construction of State law as decided by the Supreme Court of Pennsylvania, through an appeal to this court. The Fourteenth Amendment cannot be availed of for this purpose. *Herbert, et al.* v. *Louisiana*, 272 U. S. 312, 47 Sup. Ct. 103 (1926).

Respectfully submitted,

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SAMUEL GRAFF MILLER,
Assistant Counsel;
WILLIAM MCKELVY RUTTER,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1223

CHELTENHAM AND ABINGTON SEWERAGE COMPANY,

Appellant,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

Now comes the appellee, the Pennsylvania Public Utility Commission and moves that the appeal in the above case be dismissed on the ground that the case presents no substantial Federal question, and it further moves that, if the motion to dismiss be not granted, this court affirm the decision of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of this cause depends, are so unsubstantial as not to need further argument.

In support of this motion the appellee advances the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

CHARLES E. THOMAS,
Assistant Counsel;
SAMUEL GRAFF MILLER,
Assistant Counsel;
WILLIAM MCKELVY RUTTER,
Counsel.

No. 1223. CHELTENHAM & ABINGTON SEWERAGE CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION. Appeal from the Supreme Court of Pennsylvania; and

No. 1230. NEWTON OIL CO. *v.* BOCKHOLD ET AL. Appeal from the Supreme Court of Colorado. April 28, 1947. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed. Treating the papers whereon the appeals were allowed as petitions for writs of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *George Henry Huft* for appellant in No. 1223. *Max P. Zall* for appellant in No. 1230. *Charles E. Thomas, Samuel Graff Miller* and *William McKelvy Rutter* for appellee in No. 1223. *Henry E. Lutz* for appellees in No. 1230. Reported below: No. 1223, 355 Pa. 377, 49 A. 2d 707; No. 1230, 115 Colo. 510, 176 P. 2d 904.